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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 260

DORIS NYYSSONEN, Administratrix of the Estate of Einard Nyyssonen, Deceased,
Petitioner,

vs.

BENDIX CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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BENDIX CORPORATION,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Doris Nyyssonen, administratrix of the estate of Einard Nyyssonen, deceased, respectfully prays that a writ of certiorari issue to review a final judgment of the United States Court of Appeals for the First Circuit, entered in the above-entitled action on March 3, 1965 (R. 1129), in which the petitioner was the plaintiff-appellant. On April 9, 1965 (R. 1182), the Court of Appeals, without opinion, denied a timely petition for rehearing, filed March 16, 1965 (R. 1130).

A certified transcript of the record in the above case (together with 9 copies thereof), including the proceedings in the said Court of Appeals, is furnished herewith.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals (R. 1117, 1129), reported at 342 F.2d 531, 144 U.S.P.Q. 555, appears as Appendix A to this petition, p. 1a.

A Memorandum constituting the opinion, Findings of Fact, Conclusions of Law and Judgment of the District Court (R. 952-970) is reported at 137 U.S.P.Q. 853. Pertinent extracts therefrom are annexed to this Petition as Appendix B, p. 13a. The petitioner filed motions under Rules 52(b) (R. 970-1014) and 59(a) (R. 1014-1026) of the Federal Rules of Civil Procedure, pertinent extracts from which are annexed to this petition as Appendix C, p. 16a. The District Court filed a Memorandum, embodying an order (R. 1026-1027) denying these motions, which is reported at 137 U.S.P.Q. 860 and is reproduced in Appendix D to this petition, p. 17a.

JURISDICTION

The judgment of the said Court of Appeals was dated and entered March 3, 1965 (R. 1129). A timely petition for rehearing was denied April 9, 1965 (R. 1182).

The jurisdiction of this Court to review the above-mentioned judgment of the said Court of Appeals is invoked under the provisions of 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

In a case in which the federal judicial system appears to have broken down, by reason of both the District Court and the Court of Appeals professing themselves to be incompetent, for lack of technical training, to perform the judicial duties that Congress has assigned to them to perform, the following questions are presented:

I

Relating to the Complete-Combination Claims 1 and 10 of the 098 Patent

Where a passage of a patent specification is admitted, on cross-examination, by an expert witness, to be capable of having two interpretations, under one of which the patent would be held to be infringed, and under the other not infringed (though the expert witness volunteers the statement that he does "not subscribe to" that interpretation under which the patent would be held to be infringed), may either the District Court or the Court of Appeals delegate to the expert witness its duty to decide the issue of infringement, particularly since the passage is worded in simple non-technical English that does not require *any* technical training to understand it?

II

Relating to the Sub-Combination Claim 1 of the 131 Patent

On appeal from a judgment of the District Court, holding a particular claim of a patent not infringed, for a particular reason specified, may the Court of Appeals, professing itself to be unable, after limited oral argument, to understand "intelligently" what is covered by the claim, but refusing (being not "disposed") to permit any fur-

ther argument whatever, whether oral or written, through the medium of which it itself recognized that it could have obtained such understanding, make a new holding of non-infringement, not for the particular reason specified by the District Court, or, in fact, for any other reason, but for no reason at all?

III

Relating to the Cloud Unnecessarily Cast by the Volunteered Statement of the Court of Appeals That "We Think It Clear That" the Sub-Combination Claim 1 of the 131 Patent Is Invalid, for Double Patenting

On appeal from a judgment of the District Court, holding a sub-combination claim of a patent invalid, for double patenting over a complete-combination claim of another patent that was issued on the same day, may the Court of Appeals, though the issue as to whether complete-combination and sub-combination claims of two patents issued on the same day is purely legal, requiring no technical training to resolve it, refuse either to affirm or disaffirm the District Court's holding of invalidity for double patenting, but, nevertheless, volunteer a statement to the effect that "we think it clear that" the said sub-combination claim is invalid for double patenting, thus unnecessarily casting a cloud upon the validity of the said sub-combination claim, but deciding nothing?

IV

Relating to the Scope of Rule 52(a) of the Federal Rules of Civil Procedure

On appeal from a judgment of the District Court, based upon a Memorandum opinion adopting as its own (though admitting that they were therefore "less likely to reflect original thought or expression") the Findings of Fact drafted by one of the litigants, justifying its so doing upon

the ground that it had "meticulously checked" the Findings against the testimony of the said litigant's expert witness (which "check", however, was of the direct examination only of this expert witness, but without any check thereof against entirely different testimony of the same expert witness on cross-examination), has the Court of Appeals correctly construed Rule 52(a) of the Federal Rules of Civil Procedure as authorizing it to approve those Findings of Fact as not clearly erroneous, without itself first examining the record as a whole?

V

Relating to Rule 77(b) of the Federal Rules of Civil Procedure

Does Rule 77(b) of the Federal Rules of Civil Procedure, requiring trials to be "conducted in open court", authorize the District Court to treat a trial before it as though it had been conducted before the expert witness for one of the parties, belatedly "named" as master, which expert witness, furthermore, the District Court itself recognized as having a "natural bias"?

VI

Relating to Due Process

Upon appeal from both a final judgment of the District Court, issued without oral argument, and also its order denying "on their merits", without argument of any kind, oral or written, motions under Rules 52(b) and 59(a) of the Federal Rules of Civil Procedure, may the Court of Appeals, itself severely limiting oral argument, and refusing (being not so "disposed") to permit any further argument whatever, whether oral or written, through the medium of which it itself recognized that it could have become enabled to perform its judicial duties, issue a

judgment, in effect approving the issuance of the final judgment without oral argument, and, in effect, completely ignoring the appeal with respect to the denial of the motions under Rules 52(b) and 59(a)?

CONSTITUTIONAL PROVISION AND RULES INVOLVED

Extracts from the Fifth Amendment and Rules 52(a) and 77(b) of the Federal Rules of Civil Procedure

Fifth Amendment: No person shall be * * * deprived of life, liberty, or property, without due process of law * * *

52(a). * * * Findings of fact shall not be set aside unless clearly erroneous * * *.

77(b). * * * All trials upon the merits shall be conducted in open court * * *.

STATEMENT OF THE CASE

This is a suit for infringement of the two claims 1 and 10 of one patent, No. 2,790,098, covering a complete-combination synchronous machine, and one claim, claim 1, of another patent, No. 2,790,131, covering a sub-combination of the same synchronous machine, both patents being issued on the same day. The inventions covered by these claims have considerable military value (R. 109, 536).

The inventor named in the two patents in suit, Einard Nyyssonen, who died during the pendency of the appeal, was a mechanical engineer (R. 429) in the employ of a small company. He was one of the lone, independent, garret-type, non-corporate (referring to the large cor-

porations) inventors of the country, who, according to the evidence*, still produce forty per cent of our inventions. He made the inventions while engaged in the solving of a problem relating to armament (R. 430). Contrary to the usual procedure (Judge Learned Hand, *Lyon* v. *Boh*, 1924, D.C.S.D.N.Y., 1 F.2d 48, 50, rev., 1926, 2 Cir., 10 F.2d 30), these inventions met with prompt recognition in the Patent Office (R. 819, 820). The defendant, though it had for many years been compelled to content itself with inferior solutions of the problem (R. 461-463), knew nothing about these inventions until the inventor invited attention thereto (R. 706). As soon as possible thereafter, the defendant adopted the inventions (Opinion of the Court of Appeals, Appendix A, p. 8a, *infra*, "The defendant admits its change of design"), heralded them to the trade as its own (R. 781, 785-787, 827-832), received a "Product of the Month" Feature Product Award (R. 698) therefor, and filed a number of patent applications therefor in this country and abroad.

The defendant has refused to recognize the patents, wherefore it became necessary to enter this suit. After a period of some eighteen years, since May 2, 1947 (R. 434), when the inventor first brought his inventions to his attorney for patenting, the case has now, at last, reached this Court.

The complete-combination claims 1 and 10 of the 098 patent cover a machine that embodies both a stationary part, called a stator, and a movable part, called a rotor. The rotor rotates within a circular opening of the stator. The subcombination claim 1 of the 131 patent covers the stator only; as the opinion of the Court of Appeals under-

*Fritz Machlup, "Patents and Inventive Effort", 133 Science, No. 3463, May 12, 1961, page 1463.

stands correctly (Appendix A, p. 11a, *infra*), it "has no moving parts", no rotor.

Conventionally, the field-magnet windings of the rotor may be excited by either direct current or alternating current. There is nothing novel in either of these two methods of excitation; and, as was physically demonstrated at the trial, without dispute or contradiction, by operation of equipment that is in evidence (so that it could be re-demonstrated in this Court), it does not (R. 428)

> "make any difference at all, insofar as getting the improvement of the kind of winding operation in claims 1 and 10 of the 098 patent, and claim 1 of the 131 patent, whether the rotor"

is excited conventionally by direct current or alternating current.

The concluding sentence of the opinion of the Court of Appeals (Appendix A, p. 12a, *infra*), "affirming the judgment of the District Court insofar as it rests upon the issue of infringement", however, is based upon the very ground of this difference in the method of excitation (by direct or alternating current) of the rotor.

And this despite the fact that the Court of Appeals "understands" (Opinion, Appendix A, p. 7a, *infra*, line 2) that, as the District Court found (Appendix B, p. 14a, *infra*, Finding 15),

> "the gist of Nyyssonen's patents lies in the numbers of conductors in each slot [of the stator] and in their inter-connection called the conductor distribution",

and has nothing whatever to do with the rotor, or whether it is excited by direct or alternating current.

Though the Court of Appeals (though not the District Court, Finding 59, Appendix B, p. 15a, *infra*) purported, in

the said concluding sentence of its opinion (Appendix A, p. 12a, *infra*), to include all three claims in this reasoning (as to non-infringement upon the ground of the nature of the current excitation of the rotor), the petitioner and the defendant (R. 1172, second paragraph) are agreed that that reasoning does not apply to the sub-combination claim 1 of the 131 patent, which recites no rotor, at all, but is limited to the stator only. This sub-combination claim 1 could be held to be not infringed only if the accused machine embodied *a different kind of stator,* not rotor, than that claimed. In actual fact, therefore, as to this sub-combination claim 1 of the 131 patent, the Court of Appeals neither affirmed nor disaffirmed the holding of the District Court relating to non-infringement (Finding 59, Appendix B, p. 15a, *infra*), but made a brand-new holding of non-infringement of its own, and giving no reason whatever therefor.

The Court of Appeals also volunteered the statement that "we think it clear" (Appendix A, p. 12a, *infra*), though without actually so deciding, that this sub-combination claim 1 of the 131 Patent is invalid for double patenting over the complete-combination claim 10 of the 098 patent, —and this despite the fact that the two patents issued on the very same day and they expire simultaneously,—thus unnecessarily casting a cloud upon the validity of the said sub-combination claim 1 of the 131 patent.

It will be necessary to make reference also to the proceedings in the District Court.

In the old days, these patent cases were tried before masters. Though the present case, on the other hand, was started to be "conducted in open court", as required by Rule 77(b) of the Federal Rules of Civil Procedure, it later assumed the appearance of the old practice. Explaining (R. 953, Appendix B, p. 13a, *infra*) that it would other-

wise be incompetent to perform the judicial duties that Congress has assigned to it to perform, because it

> "has only the most elementary training in science and mathematics, and has little experience with modern technological developments",

the District Court thereupon treated the case as on the assumption that it had been tried, not "in open court", but before a master. The master whom the District Court thereupon assumed belatedly to have been "named" (R. 953, Appendix B, p. 13a, *infra*), was the defendant's expert witness, Professor Frazier. This expert witness' testimony, admittedly on *direct examination* only (Appendix B, p. 14a, lines 11-12), without regard to entirely different testimony of this same expert witness *on cross-examination*, was thereupon used by the District Court to "govern my findings" (R. 953, Appendix B, p. 13a, *infra*); which led to the District Court adopting, as its own, the Findings of Fact that were proposed by the defendant, based upon *this direct examination only*.

The District Court itself admitted that these Findings of Fact were not really its own, wherefore (R. 1027, Appendix B, p. 18a, *infra*), they were

> "less likely to reflect original thought or expression than a deliberate, informed, conscientious choice between proferred courses of action".

Though the District Court gave the parties leave (R. 681), at the end of the trial, to file briefs, this leave did not include oral argument and it did not provide for an opportunity even to criticize the said proposed Findings of Fact. The plaintiff offered such criticism, by the above-referred-to motions under Rules 52(b) and 59(a). The District Court denied these motions "on their merits" (R. 1027, Appendix B, p. 18a, *infra*), however, without

hearing any argument, at all, oral or written. The Court of Appeals, in effect, ignored the petitioner's appeal from this denial, stating (Appendix A, p. 12a, line 4 from the bottom, *infra*), contrary to fact (see p. 15, lines 4-10, *infra*), that the appeal from this denial had no relation to the issue of infringement (which issue of infringement is all that the Court of Appeals purported to decide).

In the Court of Appeals, the parties were permitted limited oral argument. The Court of Appeals realized that it could have obtained an "intelligent" understanding of the case through the medium of additional oral argument, or additional briefs, but it stated that it was not "disposed" to permit either (Appendix A, p. 12a, line 4, *infra*).

Discussion of Question I

A particular passage of the specification of the 098 patent, column 3, lines 60-63 (R. 36), reads that the field-magnet windings of the rotor

> "*may be* conventionally excited from a suitable source of direct current to produce a magnetic field, stationary with respect to the rotor 20" (Italics supplied).

On direct examination, the defendant's expert witness testified, in effect (as quoted by the Court of Appeals, Appendix A, p. 10a, just below the middle of the page, *infra*), that the italicized phrase "may be" must be construed to have the meaning "shall be"; thus excluding the disclosure of a rotor magnetic field that is "stationary in space [though varying in time, because alternating], with reference to a magnet" (Opinion, just below the middle of p. 9a, *infra*), the rotor. It obviously requires no technical knowledge, however, to construe the above italicized phrase "may be". As a matter of simple English, the phrases "may be" and "shall be" have very different meanings (as held,

for example, by Mr. Justice Story, *Martin* v. *Hunter's Lessee*, 1816, 1 Wheat. 304, 328, 331).

On cross-examination, the defendant's expert witness was himself forced, therefore, to admit (R. 640-641, Appendix E, p. 19a) that the above-quoted passage of the patent specification *could* be interpreted so as to include also a disclosure of a rotor that is excited by alternating current, as well as direct current (thereby including the disclosure of a rotor magnetic field that is "stationary with respect to the rotor", even though varying in time, because alternating). He volunteered, however, the "burdensome impertinence" (Judge Learned Hand, *Kohn* v. *Eimer*, 1920, 2 Cir., 265 Fed. 900, 902), the "conclusory testimony" (*Rollerson* v. *United States*, 1964, C.A. D.C., 343 F.2d 269, 272, n. 6), that he personally does "not subscribe to" the latter interpretation. The exact testimony is reproduced in Appendix E, p. 19a, *infra*.

The defendant agrees (R. 1176, lines 1-6) that the interpretation of the meaning of the said phrase "may be" is the sole point of dispute between the parties with respect to the issue of infringement relating to the complete combination claims 1 and 10 of the 098 patent.

This Court has many times ruled that the only function of an expert witness is to enlighten the Court as to the facts involved, and that it is the function of the Court, not the expert witness, to decide the merits of the case. *Winans* v. *The New York and Erie Railroad Company*, 1858, 21 How. 88, 101.

The Court has also many times laid down the rule, furthermore, as in *Smith* v. *Snow*, 1935, 294 U.S. 1, 14, that

> "if the claim were fairly susceptible of two constructions, that should be adopted which will secure to the patentee his actual invention, rather than to adopt a construction fatal to the grant."

Discussion of Question II

All that need be said as to Question II has already been said, p. 9, lines 4-8, *supra.*

Discussion of Question III

Based upon that portion of Finding 27 (R. 959, Appendix B, pp. 14a-15a, *infra*), that finds that the sub-combination claim 1 of the 131 patent

> "is exactly that which forms [as a sub-combination] the stator of the 098 patent",

the District Court concluded, as a pure question of law, that (R. 969, Appendix B, p. 15a, *infra*)

> "2. Claim 1 of U. S. Patent No. 2,790,131 is invalid for double patenting."

This pure question of law requires no technical training for its resolution. *Special Equipment Co.* v. *Coe,* 1945, 324 U.S. 370, 377. *Aro Manufacturing Co., Inc.* v. *Convertible Top Replacement Co., Inc.,* 1961, 365 U.S. 336, 344.

Discussion of Question IV

Contrary to what has been gratuitously assumed by both the District Court and the Court of Appeals, there is no question whatever involved "of the relative credibility of opposing expert witnesses" (Opinion, p. 2a, *infra*). The only question of credibility is between the testimony *on direct examination* and *cross-examination* of the same expert witness for the defendant.

By approving the District Court's adoption of the defendant's Findings of Fact, instead of deciding the case for itself, through an examination of the record as a whole, including the defendant's expert's testimony *on cross-examination,* the Court of Appeals was in conflict with this

Court's recent holding (decided since the trial, which is a ground for certiorari, *Myers* v. *Reading Co.*, 1947, 331 U.S. 477, 479), *United States* v. *El Paso Natural Gas Company*, 1964, 376 U.S. 651, 656-657 and note 4.

It was in conflict also with *Louis Dreyfus et Cie.* v. *Panama Canal Company*, 1962, 5 Cir., 298 F.2d 733, 738, in which the Court of Appeals for the Fifth Circuit held that, where a District Court adopts Findings of Fact that have been prepared by a party litigant, particularly "in a case involving complex and technical subject matter, as in patent cases", it should do so only after it has "reached its decision independently *before* placing reliance on the proposed findings" (italics the Court's).

Discussion of Question V

The requirement of Rule 77(b) that trials "shall be conducted in open court" has consistently been enforced by this Court. *Los Angeles Brush Manufacturing Corporation* v. *James*, 1927, 272 U.S. 701. *McCullough* v. *Cosgrave*, 1939, 309 U.S. 634. *LaBuy* v. *Howes Leather Co., Inc.*, 1957, 352 U.S. 249 (a case the complexities involved in which related to complicated matters other than patents).

These three decisions will become overruled, and Rule 77(b) will become abrogated, if this Court should approve the District Court's delegating (the word used by Judge Merrill E. Otis, 1 F.R.D. 83) the decision of this case to the expert witness for the opposing litigant, assumed belatedly to have been "named" as master, despite his "natural bias". Other District Courts will promptly likewise adopt this procedure.

Discussion As to Question VI

In addition to approving the District Court's delegation (without even any oral argument) of the decision of the

case to the defendant's expert witness, the Court of Appeals (Appendix A, p. 12a, lines 4 and 5 from the bottom) also ignored the appeal from the denial of the motions under Rules 52(b) and 59(a), which included Findings 58, 59 and 60 (R. 1001-1005, Appendix B, p. 15a) expressly relating to the issue of infringement. The very issue relating to the expression "stationary with respect to the rotor", for example, as used in the above-quoted (p. 11) passage of the specification of the patent, is discussed, in connection with Finding 58f, at R. 1003 (Appendix B, p. 16a, *infra*).

REASONS FOR GRANTING THE WRIT

This petition raises several very important issues.

A. This Court Should Inform Congress, If Such Be the Fact, That the Judicial System That It Has Set Up Has, Indeed, Broken Down.

So far as known, this Court has never decided, but now should decide, Rule 19(1)(b) of this Court, whether the federal courts may refuse to perform the duties that Congress has set before them to perform, upon the ground of lack of technical training.

Examples of how other courts have solved this problem, merely through the medium of oral argument, are given at R. 1160-1161. In one case, *United States Plywood Corporation* v. *General Plywood Corporation*, 1964, D.C. Ky., 230 F. Supp. 831, 833, for example, a District Court became enabled to "reject" the proposed Findings of Fact of the parties, in a field in which it confessed itself (quoting the precise language of the District Court in the present case) to be wholly untrained technically, and to draft its own Findings of Fact, merely by listening patiently to five days of oral argument, page 832.

This Court has many times demonstrated its appreciation of the value of oral argument in cases that it has found it to be difficult otherwise to decide. Rule 45(1) of this Court. *Coleman* v. *Miller,* 1939, 307 U.S. 433, 444. Upon occasion, indeed, this Court has even called for further argument. *Brown* v. *Board of Education of Topeka,* 1953, 345 U.S. 972.

B. This Court Should Decide Whether It Is Still Possible to Encourage Lone Inventors to Make Inventions Having Military Value.

This Court has pronounced it to be "a policy of wisdom" to encourage inventions relating particularly to the defense of our country, *United States* v. *Bethlehem Steel Company,* 1922, 258 U.S. 321, 327; with the same end in view, Congress, *Halpern* v. *United States,* 1958, 2 Cir., 258 F.2d 36, 39,

> "evinces a strong concern that inventors be encouraged to discover inventions having military value;"

and Admiral Rickover* has expressed himself as

> "primarily interested in the subject of patents as it relates to national security, the strength and safety of our country."

The grave problem arises, therefore, as to how we shall be enabled to encourage these lone inventors to continue to make inventions having military value, if our federal courts are to be permitted to confess themselves unable to protect these inventors, without even trying to do so by the simple expedient of hearing oral argument, and sufficient oral argument.

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*Hearings before the Subcommittee on Patents, Trademarks, and Copyrights, of the Committee on the Judiciary, United States Senate, 87th Congress, First Session, pursuant to S. Res. 55 on S. 1084 and S. 1176, on "National Patent Policy", June 2, 1961, p. 2.

The Court should decide this issue in the present case, because it is "unlikely" (*Muncie Gear Works, Inc.* v. *Outboard, Marine & Manufacturing Co.*, 1942, 315 U.S. 759, 766) that another of these forty-per-cent lone inventors (see p. 7, line 2, *supra*) will have the fortitude to keep on fighting for his patent rights over a period as long as eighteen years.

C. This Court Should Decide the Proper Scope of Rules 52(a) and 77(b) of the Federal Rules of Civil Procedure.

Still another issue, raised by Questions IV and V, which this Court should now decide is as to the proper scope of Rules 52(a), see p. 14, lines 1-2, *supra*, and 77(b), see p. 14, lines 5-4 from the bottom, *supra*.

D. The Decision of the Court of Appeals Is in Conflict with Prior Decisions of This Court and of Other Courts of Appeals.

Attention is invited to the two cases cited at the bottom of p. 12, the two cases at the middle of p. 13, the six cases on p. 14, and the cases referred to in the last paragraph on p. 16. Also, particularly in connection with Question III, "normally * * * the better practice," *Sinclair & Carroll Co., Inc.* v. *Interchemical Corporation*, 1945, 325 U.S. 327, 330, is to inquire "fully into the validity of this patent".

E. The Issue of Due Process.

Another issue raised, not only by Question VI, but also by all the other questions, as well, is whether the petitioner has been accorded due process. Upon such issue, this Court "will re-examine the evidentiary basis" for itself. *Niemotko* v. *Maryland*, 1951, 340 U.S. 268, 271.

F. A Further Issue That This Court Should Decide.

A further issue that this Court should decide is whether the District Court and the Court of Appeals both have not

so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. Rule 19(1)(b) of this Court.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals

For the First Circuit

No. 6189.

EINARD NYYSSONEN,
PLAINTIFF, APPELLANT,

v.

BENDIX CORPORATION,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Robert H. Rines, with whom *David Rines* and *Rines and Rines* were on brief, for appellant.

Morris Relson, with whom *Floyd H. Crews* and *Robert R. Keegan* were on brief, for appellee.

OPINION OF THE COURT.

March 3, 1965.

WOODBURY, *Senior Circuit Judge* (by designation). We are concerned on this appeal with two patents issued to the plaintiff-appellant on the same day, April 23, 1957. One, No. 2,790,098, is for a Polyphase Synchronous Machine; the other, No. 2,790,131, is for a Polyphase Transformer System.[1] In issue are claims 1 and 10 of the 098 patent and claim 1 of the 131 patent. The court below found all three claims both invalid and not infringed, and entered a

[1] We shall refer to the patents hereinafter by the last three digits of their respective numbers.

judgment dismissing the plaintiff's complaint from which he has taken this appeal.[2]

The patents are long. One consists of 11 pages of drawings (26 figures) and almost 50 columns of text, and the other 9 pages of drawings (21 figures) and almost 44 columns of text. Both are highly technical in the fields of advanced mathematics and electrical engineering in which no member of this court can profess any competence. We can say with the court below that this case presents great difficulties to judges like ourselves who have only the most elementary training in science and mathematics and little experience with modern technological developments.

The court below in recognition of its avowed limitations rested its decision basically on its evaluation of the relative credibility of opposing expert witnesses. In view of the extreme technicality of the subject matter and the serious risk of making scientific and technological errors, the court invited each party to submit draft findings of fact. Then, concluding on the basis of observation at the trial and rereading the transcript that the defendant's expert was the clearer, more credible and more expert, it adopted the defendant's draft. It did not do so as a matter of rote, however. It said:

> "Defendant's draft, as appears from supporting citations, rests, in the places where the issues are sharpest, upon Dr. Frazier's testimony and upon admissions by plaintiff's counsel and plaintiff's own expert. My own findings of fact are in most respects verbatim copies of this draft, but these findings do reflect my independent and meticulous check of the record itself."

The plaintiff-appellant complains of the District Court's technique of decision asserting that it deprives him of due process of law. We do not agree.

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[2] He also appealed from orders denying motions under Rule 52(b) and 59(a) of the Federal Rules of Civil Procedure.

Counsel are certainly entitled to file proposed findings of fact on their own initiative and we see nothing whatever in any way irregular for a court to ask them to do so, particularly in a highly technical and complicated case like the present. Nor is there any reason why counsel should not cast their requests in a form which if approved could be adopted by the court as its findings. *Hazeltine Research, Inc.*, v. *Admiral Corp.*, 183 F.2d 953 (C.A. 7, 1950), *cert. denied*, 340 U.S. 896. Ordinarily we think it the better practice for the trial court to prepare its own findings with such help as it may derive from counsels' requests. But this is no ordinary case. In a case of this difficulty we think the court below was fully justified in avoiding the risk of slipping inadvertently into serious scientific error by relying heavily upon counsel for technical findings based upon highly technical evidence. The question is whether the findings are supported by the evidence. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 184-185 (1944).

We turn now to the patents themselves.

A synchronous machine such as is covered in the 098 patent is defined by the American Institute of Electrical Engineers in its Standard Definitions as ". . . one in which the average speed of normal operation is exactly proportional to the frequency of the system to which it is connected." These machines consist, as we understand it, either of a synchronous generator, defined on the same authority as ". . . a synchronous alternating current machine which transforms mechanical power into electrical power" or a synchronous motor defined as ". . . a synchronous machine which transforms electric power from an alternating current system into mechanical power." The purpose of these machines operating together in a synchronous system is to transmit synchronized rotary motion over a distance by means of electricity. An electric clock is an example.

Almost all electric power produced in this country is

60-cycle alternating current. This means that the current reverses in direction from positive to negative and from negative back to positive again 120 times per second. Each cycle includes current in one direction for 1/120 of a second and current in the opposite direction for the next 1/120 of a second. The current is maintained at this frequency of alternation by running the synchronous generator which produces the current at constant speed, the frequency of the current being in direct proportion to the speed of rotation of the rotor of the generator. An electric clock uses a synchronous motor and keeps accurate time for two reasons. The first is that the generator is maintained at constant speed to produce a constant 60-cycle frequency. The second is that the synchronous motor in the clock runs at a speed directly proportional to the frequency of the current supplied to it. The hands move 1/60 of a second for each full cycle of current.

The art of synchronous machines is not new. They have been known and used at least since about the turn of the century as appears from the reference to such machines in Patent No. 765,995 issued to Alexanderson on March 28, 1905. Nyyssonen's claimed contribution to the art is smaller size and greater accuracy, which he says he attained by novel means. The defendant-appellee disputes Nyyssonen's claimed contributions, denies the novelty of his means and asserts that the accused devices it manufactures do not infringe even if Nyyssonen's patents are valid. The court below resolved these issues against the plaintiff. It held all claims in issue invalid in view of the prior art, claim 1 of the 131 patent also invalid for double patenting, and none of the claims infringed.

The testimony of the defendant's expert witness, whom the court below found clear, credible and skilled and upon whom it relied, provides ample evidentiary support for this finding. But plaintiff's counsel contends that no question

of this witness's credibility is involved because his testimony is demonstrably mistaken, wherefore the findings based thereon are "clearly erroneous."

Resolution of this contention takes us into the construction and operation of generators and motors in general and then leads on into technical details many of which we find beyond our comprehension, for the plaintiff's patents are not only voluminous but are couched in a technical vocabulary with which we are wholly unfamiliar. We frankly admit that we cannot read them intelligently. We quote claim 10 of the 098 patent in the margin to illustrate our difficulty.[3] Moreover, we have great difficulty in understanding, even in a general way, the technical testimony of the experts and the discussion of that testimony by counsel orally and in their briefs. However, we must do the best we can.

Generators and motors are structurally very similar.

---

[3] A synchronous machine having in combination, stator and rotor elements, one of the elements having a magnetizable core provided with an assembly, stationary with respect to the said one element, of substantially equiangularly spaced slots comprising one or more collections each of substantially the same number of slots, a polyphase winding comprising a plurality of phase windings each having a number of conductor groups substantially equal to the number of slots, a conductor group of each phase winding being disposed substantially in each slot, the numbers of conductors of the conductor groups of each phase winding varying substantially as the absolute values of the sine over a total range substantially equal to 180 degrees multiplied by the number of collections of slots at angular increments each substantially equal to the said total range divided by the number of slots, the respective total ranges being displaced with respect to one another an angular amount substantially equal to the phase displacement of the phase windings, the directions of winding of the conductors of the conductor groups of each phase winding changing alternately with, and with the negative of, the sign of the said sine, the conductor groups of the respective phase windings being connected in series along the said directions of winding, and the other element having means for producing a magnetic field, stationary with respect to the said other element, of substantially equiangularly spaced poles of alternately opposite polarity equal in number to the number of slots plus or minus the number of collections of slots.

Both operate by systems of electro-magnets and both have two main components, a stator, which is a stationary part and a rotor, which is a rotating part. All such machines have a field member and an armature, either one of which may be the rotor while the other is then the stator. For present purposes the rotor will be deemed the field member.

All rotating electric machines are provided with a predetermined number of electro-magnetic poles arranged alternately north and south, or positive and negative, around the periphery of the rotor. The number of pole pairs determines the speed of the machine, be it a generator or a motor. We see no need to elaborate further on this feature of electric generators and motors. The stators of these machines, regarded as the armatures, consist of electro-magnets equiangularly spaced around the periphery facing the magnets of the rotor. These magnets are separated by apertures called slots in which are disposed electric conductors in the form of wires. The movement of the rotor field winding electro-magnetically induces voltages in these conductors and these voltages are the output electricity of the generator.

The total slots in the stator of the machine covered by the 098 patent are divided into "collections" or "sets" and the number of slots per "collection" differs from the number of rotor poles per "collection" by one. No specific number of slots is specified in the patent. Nyyssonen's primary example is 9 slots and 8 poles but his patent is general enough to cover any number. While "collections" or "sets," sometimes called "repeatable groups," of slots are identical,[4] the number of conductors or wires in each

---

[4] We are not impressed by the appellant's argument that this is not so because patent 098 is not limited to the same number of stator slots in each collection. All he seems to have in support of his contention is lack of specific language in the patent and Fig. 22 showing collections the mirror images of one another. Anyway we do not consider resolution of this dispute dispositive of the case.

slot of each group is not, but varies from one slot to the next. The court below found, and as we understand the case, the gist of Nyyssonen's patents lies in the numbers of conductors in each slot and in their inter-connection called the conductor distribution.

Nyyssonen's conductor distribution is called a "sine distribution" which means that the number of conductors in any one slot for one phase winding is in proportion to the trigonometric sine function of an angle associated with the particular slot called in the patent the "phase-sequence angle."[5] The basic bones of contention on the issue of validity is whether the sine distribution was new with Nyyssonen, the court below held it was not, and whether the defendant used that distribution in its accused devices or used instead an earlier distinctly different one called the Glass distribution, as the court below held.

Solution of this issue requires discussion of the accused machines which are not synchronous machines but synchros regarded by the plaintiff's expert as a sub-class of synchronous machines but by the defendant's expert as in a separate category. Synchros like synchronous machines consist of a stator and a rotor but they are not designed or intended, although they might perhaps be used, for synchronous continuous rotary motion. Synchros are remote positioning devices designed for the transmission of angular values to a distance by electricity, either through wires or by radio.

A synchro system consists of two synchros, a transmitter

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[5] Additionally the patent describes an alternate opposite direction of winding of the conductor groups of each phase winding. This means that when the slots are arranged in a particular sequence the current in the conductors is in one direction in one slot and in the opposite direction in the next slot of the sequence. However, the court below, clearly on adequate evidence, found alternately opposite direction of winding to be inherent in all synchronous machines and not a distinguishing characteristic of Nyyssonen. We need give this feature no further consideration.

and a receiver. When such a system is electrically energized the rotor of the receiver will align itself with respent to its stator with the alignment of the rotor of the transmitter with respect to its stator. Thereafter when the rotor of the transmitter is turned the rotor of the receiver will move in the same direction to the same extent. They are used among other places on submaries to indicate deviation of the vessel from its level. A gyro on a submarine tells which way is "up." When the vessel tilts, its angle with respect to "up" changes. Thus if a gyro is appropriately attached to the rotor of a transmitter synchro, the rotor will be moved with the vessel's tilt and an electrically connected receiver synchro in an indicator will show the direction and extent of the tilt.

The conductors in the slots of the stators of the accused devices vary in number from slot to slot as in Nyyssonen. But the defendant contends that it does not use a sine distribution but a Glass distribution, that is to say, a distribution based upon the disclosure of patent No. 2,488, 771 issued to its assignor and research man, John P. Glass, Jr., in 1949 on a 1944 application for "Induction Devices Having a Substantially Pure Sine Relation Between the Coupling and the Relative Displacement of Its Elements." The plaintiff concedes, as he must to escape anticipation, that the defendant indeed originally used a Glass distribution which was not Nyyssonen's distribution. But he contends that after Nyyssonen showed his patent to the defendant is changed its devices to his distribution, indeed, brazenly pirated his invention. The defendant admits its change of design. But it asserts that its change was not to Nyyssonen's distribution and owed nothing whatever to his teaching but resulted entirely from its independent research in developing the Glass distribution in the light of the prior art. The plaintiff admits that the defendant indeed used the old Glass techniques in its new accused

synchros but he asserts that it uses his novel sine distribution in them as well.

The Glass distribution and the sine distribution are similar in some respects but differ in others. The opposing expert witnesses disagree as to their similarities and differences. We frankly admit that we cannot understand the difference between the two types of distribution well enough to say with any assurance which expert was correct.

One basic contention of counsel for the plaintiff-appellant with respect to infringement, however, we at least think we understand. Wherefore we decide this case on that issue alone.[6] This is his assertion that the defendant infringes because it uses in the rotor of its accused machines a "stationary magnetic field" new to the art with Nyyssonen.

We start with consideration of the meaning in Nyyssonen's patents of a "stationary magnetic field." This is necessary because magnetic fields may be either stationary in time or stationary in space with reference to a magnet. (Of course, if a magnet is physically moved its field, *i.e.*, the space near the magnet in which its magnetic forces are sensible, will of necessity move with it.) A magnetic field is stationary in time when its polarity does not change, as is the case with a permanent magnet or an electro magnet energized by a direct current of electricity. In such magnets the north pole is always the north pole and the south pole is always the south pole. An electro-magnet energized by an alternating current of electricity, however, changes its polarity with the frequency of the current. Its field, therefore, is not stationary but alternating in time.

The magnets in the rotor of Nyyssonen's machines are activited by direct current and so their magnetic fields are

---

[6] The court below found: "The windings of the accused machines are different from Nyyssonen's, function differently from Nyyssonen's, and any similarity in result is produced in a different way."

stationary in time as well as, necessarily, stationary in space with respect to their magnets. The magnets in the rotors of the defendant's accused devices, however, are activated by alternating current. Wherefore their fields are not stationary in time, although, of course, their fields are stationary with reference to their magnets as in Nyyssonen and everywhere else. There being no doubt that Nyyssonn activated the magnets in his rotor by direct current and there being equally no doubt that the defendant activited the magnets in its rotors by alternating current, claim 10 of the 098 patent can be made to read on the accused devices only if "stationary" means space, not time. Indeed, the plaintiff's expert made it clear that stationary had to read in a spatial sense to make claim 10 read on the defendant's synchros.

The defendant's expert, however, took the view that "stationary" in the Nyyssonen patents referred to time insofar as the magnets in the rotors of his devices were concerned. He testified:

> "Q. Does the Nyyssonen machine as described in the Nyyssonen patent have a stationary field for the rotor?
>
> "A. It has a stationary field with respect to the rotor.
>
> * * *
>
> "Q. Do the accused structures have a stationary field?
>
> "A. The accused structures do not have a stationary field with respect to the rotor.
>
> "Q. In what sense is the field of the accused structures not stationary?
>
> "A. It is alternating."

The court below took the defendant's expert witness' view of the patent. It found that claim 10 of the 098 patent did not read on the accused synchros because: "The rotor field is not stationary, but varies by alternating. As used in the Nyyssonen patent 'stationary' means a direct current

excited field, absent from the accused synchros." Thus the issue turns upon whether "stationary" as used in the patents means stationary in time or stationary in space.

In resolving this issue the court below relied upon the defendant's expert witness. This was quite proper, for a patent speaks to its art and what it says can be told in complicated cases like this only by one skilled in the art. In *B. F. Sturtevant Co.* v. *Massachusetts Hair & Felt Co.*, 122 F.2d 900, 908 (C.A. 1, 1941), *cert. denied*, 315 U.S. 823 (1942), this court held that an expert witness might testify that a patented invention was not disclosed in the prior art. By the same token we think an admitted expert may say what a complicated patent covers and discloses to its art. The question is the credibility of the witness and that primarily is for the trial court under Rule 52(a). Indeed, as the Court pointed out in *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274 (1949), to no type of case is the admonition to give due regard to the opportunity of the trial court to judge the credibility of witnesses more appropriately applicable than to cases like the present ". . . where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific demonstrations." We think the trial court's interpretation of the patent in the respect under consideraion is clearly correct and from this it follows that the conclusion of non-infringement is also correct.

So far we have only mentioned but not considered claim 1 of the 131 patent for a Polyphase Transformer System, a device which has no moving parts. This is because the parties have laid little stress on this claim apparently being almost in agreement that it stands or falls with claim 10 of the 098 patent. Plaintiff's counsel, however, contends that it is possible to find claim 1 infringed "if this court should hold [as we do] that the magnetic field of the rotor of the accused multipolar synchro is not stationary, because it is

alternating." Without more illumination than we get from the plaintiff's brief we cannot pass intelligently on this assertion. We need not invite further brief and argument, however, even if we should be disposed to allow plaintiff's counsel another bite at the cherry when his brief is 147 pages and his reply brief adds 25 pages, because we think it clear that claim 1 is invalid for double patenting over claim 10 of the 098 patent by merely using the word "circuits" in place of the word "slots."

In deciding this appeal only on the issue of infringement we are not unmindful of the desirability of disposing of patents as a whole to the end that invalid patents "should not remain in the art as a scarecrow," to quote the late Judge Learned Hand in *Bresnick* v. *United States Vitamin Corp.*, 139 F.2d 239, 242 (C.A. 2, 1943). See this court's discussion in *Hale* v. *General Motors Corp.*, 147 F.2d 383, 388 (C.A. 1, 1945). The reason for our limiting our consideration to the issue of infringement in this case is that we cannot say with any assurance that Nyyssonen's patents are indeed invalid and we think it would be unwise in this situation to run the risk of mistaking a scarecrow for a farmer leaning on his hoe, to carry on Judge Hand's picturesque simile.

This, however, does not imply any criticism whatever of the court below for deciding both validity and infringement. The court below took the proper course to avoid remand and perhaps retrial, should its decision of but one of the issues be reversed on appeal.

The disposition we make of this appeal renders unnecessary any consideration of the appellant's other contentions. His appeals from the denial of his motions under Rules 52(b) and 59(a) relate to the issue of validity.

Judgment will be entered affirming the judgment of the District Court insofar as it rests upon the issue of infringement.

APPENDIX B

(R. 952-954) MEMORANDUM

April 29, 1963

Wyzanski, D. J.

This is a suit for infringement of claims 1 and 10 of Nyyssonen U. S. Patent No. 2,790,098 and claim 1 of Nyyssonen U. S. Patent No. 2,790,131 entitled respectively Polyphase Synchronous Machine and Polyphase Transformer System.

This case presents great difficulties to a judge who, like myself, has only the most elementary training in science and mathematics, and has little experience with modern technological developments. In effect, my position with respect to the facts is hardly better than that of an average juror in an ordinary patent case.

Careful attention to the witnesses as they testified and a re-reading of the transcript persuades me that the most expert, the clearest, and the most credible witness was Professor Richard H. Frazier of M.I.T. who testified for defendant. I have not been unmindful of his long term association with defendant and with the natural bias which may affect an expert called and employed by one of the parties. Yet, with full discount for those factors, I conclude that his testimony is reliable, on critical points is not substantially different from what he would have reported to this Court had he been named its Master, and on all essential technical controversies should govern my findings.

It would be possible for me to go through the record preparing a summary of Dr. Frazier's testimony. Instead, in view of the extreme technicality of the subject-matter and the serious risk that unless I rigorously adhered to

precise quotation of the testimony I would make scientific and technological errors, it seemed to me better to allow each party to prepare a set of draft findings of fact.

Defendant's draft, as appears from supporting citations, rests, in the places where the issues are sharpest, upon Dr. Frazier's testimony and upon admissions by plaintiff's counsel and plaintiff's own expert. My own findings of fact are in most respects verbatim copies of this draft, but these findings do reflect my independent and meticulous check of the record itself.

I have also read with care, and checked against the record, plaintiff's proposed findings. I reject those proposed findings even where they approximately duplicate the findings I have made, but I treat them as specific objections to the findings and conclusions I have made and also, of course, as requested but rejected findings.

Those proposed plaintiff's findings shall be regarded as incorporated in the formal record, and may serve as a basis for arguing to an appellate court that I was in error.
Charles E. Wyzanski, Jr., D.J.

United States District Judge

* * *

FINDINGS OF FACT

April 29, 1963

* * *

(R. 957)

15. The gist of the patent therefore resides in the numbers of conductors in each slot and their inter-connection. This has been called the conductor distribution.

* * *

(R. 959)

27. The '131 patent is directed to a "Polyphase Transformer System". This patent has no moving parts. * * *

This electromagnetic system is exactly that which forms the stator of the '098 patent. The claim 1 in suit is directed to such a system.

* * *

(R. 965-966)

58. Claim 10 of the '098 patent does not read on the accused synchro because:

* * *

f. The rotor field is not stationary, but varies by alternating. As used in the Nyyssonen patent "stationary" means a direct-current-excited field, absent from the accused synchros.

* * *

59. Claim 1 of the '131 patent does not read on the accused synchros because the accused synchros do not have "phase windings" with the recited characteristics.

60. Claim 1 of the '098 patent does not read on the accused synchros because:

a. The "magnetic system" * * * of magnetic fluxes is not "stationary" and the rotor field is not "stationary" but both are alternating.

* * *

(R. 969)

CONCLUSIONS OF LAW

* * *

2. Claim 1 of U. S. Patent No. 2,790,131 is invalid for double patenting.

* * *

APPENDIX C

Excerpt from

(R. 970) PLAINTIFF'S MOTION UNDER RULE 52(b)

* * *

(R. 1002-1003) Finding 58

* * *

Finding 58f should also be deleted. The rotor field winding that is referred to in this Finding 58f, though alternating, is nevertheless stationary with respect to the rotor, in the sense that it does not depart from its location on the rotor. The words "may be", in column 3, line 60 of patent 2,790,098, are used with the very purpose in view of not confining the plaintiff's inventions to use with only direct-current excitation of the rotor.

* * *

Excerpts from

(R. 1014) PLAINTIFF'S MOTION UNDER RULE 59(a)

* * *

(R. 1017-1019)

The Court accepts Professor Frazier's testimony as "not substantially different from what he would have reported to this Court had he been named its Master".

A master, however, would have taken testimony, instead of, as here, offering it himself.

A master, moreover, would have been impartial, whereas Professor Frazier here served in the capacity of a biased advocate.

* * *

Thirdly, before a master, under Rule 53(e)(II) of the Federal Rules of Civl Procedure, the plaintiff would have been

allowed to object to the master's report, and to argue the same before the Court, and the Court would have been afforded an opportunity to "modify it" or to

> "reject it in whole or in part or may receive further evidence".

Rule 53(e)(V), moreover, provides further that

> "Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions".

The plaintiff has been deprived of all these safeguards. They would be restored to him, however, upon the granting of the present motion.

* * *

APPENDIX D

(R. 1026-1027)

MEMORANDUM

May 13, 1963

Wyzanski, D.J.

This Court has studied plaintiff's motions under Rules 52(b) and 59(a). These motions speak for themselves. They include an attack upon the character and good faith of Professor Frazier (an academic colleague of whom plaintiff's counsel spoke in the highest terms during the trial) and an implied appeal to this Court to disregard the judicial oath to do equal justice to the poor and the rich and to decide technical questions (involving the validity and infringement of patents) with reference to the comparative wealth of the parties.

Every major point raised in these motions was before plaintiff's counsel (and to a large extent dealt with by

him) when he filed his briefs, requests for findings, and objections to findings before this Court entered its findings.

After careful consideration this Court concluded originally, and remains of the view, (1) that plaintiff's patent claims here in issue do not represent that kind of advance over the prior art which represents invention and (2) even more clearly, that plaintiff has not borne the burden of proving by a preponderance of the credible evidence that defendant's accused devices are within his claims. In reaching these conclusions this Court, while responsive to the persuasive forms of statement by defendant's counsel, has reached its own judgment.

Of course, such a judgment by a layman in a field of advanced technology is less likely to reflect original thought or expression than a deliberate, informed, conscientious choice between proferred courses of action. It is no service to the integrity of the process of justice or the development of the law for a judge to pretend otherwise.

As a matter of judicial discretion, this Court declines to hear oral argument in support of these more than ample written motions. As a matter of substantive law, this Court denies the motions on their merits.

Motions denied.

Charles E. Wyzanski, Jr., D.J.
United States District Judge

APPENDIX E

Excerpts from Cross Examination of the Defendant's Expert, Professor Frazier (R. 640-641)

Q. May I call your attention to column 3, line 60 of the 098 patent? Here it refers to the use of direct current to produce a magnetic field stationary with respect to the rotor—correct?

A. Yes.

Q. Is that not susceptible of two interpretations, Dr. Frazier: One, that the field, because it's direct current, is of constant amplitude so in that sense it's stationary; and, two, that the field doesn't move out of the space that it is created in with respect to the rotor but moves as a unit with the rotor?

A. Well, you may interpret it that way.

Q. And if I interpret it the second way that that is what the language means, *stationary with respect to the rotor, is it not in that second interpretation also true of the rotor of a synchro that has an oscillating current on it but the space occupied by the field is fixed and moves with the rotor?*

A. *It is true in that interpretation,* but I do not subscribe to the interpretation.

Q. But it is true with respect to that interpretation?

A. That's right (italics supplied).

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 260

DORIS NYYSSONEN, Administratrix,
Petitioner,

vs.

THE BENDIX CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Introduction

This is an ordinary action for alleged patent infringement in which the District Court correctly found the two patents in suit to be not infringed and to be invalid. The Court of Appeals affirmed on the issue of non-infringement without expressly adjudging the issue of invalidity (although intimating that it considered one of the three patent claims in issue to be invalid).

Petitioner here* essentially complains that he was unsuccessful in meeting his burden of persuading the Courts below that his patent is infringed.

* "Petitioner" will refer both to the patentee-plaintiff below and his administratrix who is named petitioner here.

As shown below, no unusual questions of law or fact are involved and no reason exists for the intervention of this Court to review the concurrent holdings of the courts below. The only unusual aspect of the case stemmed from the patentee's lack of familiarity with the standard terms of the art,* which led him to coin his own special terminology where standard terms could have been used (R. 300-7, 384-5) and to use standard terms contrary to their accepted meanings (R. 306-7, 384-5), making it difficult to determine the nature and significance of his supposed invention. In essence, the patentee worked in ignorance of the art, and his work was simply a repetition of prior work in the field, which was explained in different language which made his work *appear* to be different in structure when in fact it is not.

Opinions Below

The opinions below are properly cited at P. 2**. However, petitioner has reproduced the District Court's findings of fact and conclusions of law in an excised version which creates a misleading impression; respondent therefore respectfully requests this Court to examine the entire findings of fact and conclusions of law entered by the trial court, appearing in the Record at R. 954 to 968, which better indicate the detailed consideration of the testimony and record in all of its relevant portions by the trial court and the matters reviewed by the appellate court.

Questions Presented (P. 3-6)

The questions asserted in the petition do not truly reflect the record or the opinions in this case. They are based

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* The patentee was a mechanical engineer, with no special training or experience in electrical machinery of the type involved here (R. 430, 449).

** "P. 2" designates the Petition, page 2.

on argumentative assertions, assumptions contrary to fact, fallacious conclusions, and petitioner's contrary view of disputed facts found by both courts below, to such an extent that respondent finds it impossible to rephrase them to reflect actual questions in the case. They are discussed in more detail below under the headings "Counter-Statement of the Case" and "Argument".

Counter-Statement of the Case

The following statement is necessary to correct and supplement petitioner's statement of the case.

1. Petitioner's 18-year "fight for his patent rights" was of his own creation.

Petitioner solicits sympathy because he has assertedly been "fighting for his patent rights over a period as long as eighteen years" (P. 17; see also P. 7). The cold fact is that the present dispute stems only from October 1959 when respondent first advertised the accused products (R. 442, 698, 699).

The patentee "first brought his inventions to his attorney for patenting" in 1947 (P. 7). The two applications for patent were filed December 3, 1953, and April 29, 1955. The patents issued together on April 23, 1957. A charge of infringement was made (R. 552), leading to discussions in which respondent disclosed the grounds (subsequently confirmed by the Courts below) why there was no infringement. Suit was started in May, 1962. Trial was held in early March, 1963. The trial court decision was handed down April 29, 1963. The affirming decision of the Court of Appeals was issued March 3, 1965.

The eighteen-year period complained of by petitioner (P. 7, 17) was thus essentially entirely of his own making.

2. Petitioner had full opportunity for argument before both Courts below.

Following a seven-day trial at which an expert testified on behalf of each party, the trial court indicated that it did not desire oral argument, but would consider briefs and proposed findings. Both parties submitted briefs and proposed findings, and, in addition, each submitted a reply brief.

Plaintiff submitted 86 proposed findings in 22 typed pages, a six-page "Scientific Statement" by his expert, a brief of 41 typed pages, and a reply brief of 54 typed pages.

After the trial court's decision, plaintiff submitted a Motion under Rule 59(a) for a new trial (15 typed pages) and a Motion under Rule 52(b) for amendment to the findings (72 typed pages).

On his appeal, plaintiff asked for and was given leave to exceed the usual maximum length of brief, and filed a printed brief, including appendices, of 152 printed pages (instead of the usual 75 pages) and a reply brief of 25 printed pages. Plaintiff asked for and received leave for extra oral argument and used two hours for his argument (instead of the usually alloted one hour). The entire oral argument extended slightly over three hours.

3. The findings of fact reflect the District Court's own decision.

The trial court, as its memorandum opinion indicates (P. 14a), based its findings upon those submitted by defendant, but did not adopt them entirely or verbatim; the trial court in fact refused a number of proposed findings and revised others, while adopting still others verbatim.*

* Proposed findings 1-3, 7-12, 14, 57, 78-82, 86-88, and 91-93 were refused, although the substance of some (but not all) was adopted by the Court. Proposed findings 13, 18, 22, 29, 30, 32-37, 40, 41, 46, 49, 50-52, 62, 64, 65, 67-76, 83-85, 89, 90, and 94-96 were revised. Proposed additional findings 65a, 78a, 83a, 86a and 90a were refused.

The Court characterized them as "my own findings of fact", and expressly stated that they reflect his "independent and meticulous check of the record itself" (P. 14a).

The Court of Appeals pointed out that this procedure was not a "matter of rote" (P. 2a).

It is clear that the trial court determined the *substance* of the findings, and utilized the wording of respondent's draft merely to minimize technical error.

4. Petitioner's charge that the Courts below failed to consider the full record has no foundation.

Petitioner repeatedly asserts that both courts below considered only the direct testimony of defendant's expert and ignored his cross-examination (P. 5, 10, 13). This is utterly without basis. It is also directly contradicted by the Courts themselves.

The trial court said (P. 14a) his findings "do reflect my independent and meticulous check of the record". This included findings 58f and 60a (P. 15a) challenged by petitioner, and on which the Court of Appeals expressly said (P. 11a) "We think the trial court's interpretation of the patent in the respect under consideration is clearly correct . . ."

Petitioner's attack amounts to a challenge of the truthfulness of the District Court and to a charge that the Court of Appeals would affirm without review of the record. The sole basis for petitioner's accusation is that these courts refuse to construe a passage from the cross-examination of defendant's expert as petitioner would like them to construe that passage. As shown below, the courts below were perfectly justified in so doing.

Argument

This case has been properly decided on the basis of its own facts and it does not present any unsettled or dis-

putable questions of law. All that is involved is that two patents were held by the District Court to be invalid and not infringed, the Court of Appeals reviewed, and upon a careful independent analysis held the patent claims in issue to be not infringed* (without expressly adjudging the question of validity). No issue is presented which is likely to affect any other patent.

There is no conflict between circuits; the action of the Court of Appeals below is in full accord with applicable decisions of this Court and of the Courts of Appeals; the conduct of the trial court and the Court of Appeals, despite difficulties occasioned by the plaintiff's obfuscatory presentation of technical subject matter, was exceedingly competent and above valid criticism in respect to careful observance of and protection of the rights of the parties.

There is no question of general interest or public importance in the case. This case presents no special or important reasons justifying the extraordinary remedy of a writ of certiorari, and the petition should be denied because, as discussed more in detail below:

1. Mere dissatisfaction with the trial court's determination of disputed fact questions and its evaluation of testimony is not proper ground for the grant of a writ of certiorari (Petitioner's Question I).

2. Desire of the petitioner for an extraordinary opportunity to present additional oral and written argument on points already fully considered by both Courts below and upon which there was a generous opportunity to submit argument is not a proper ground for the grant of a writ of certiorari (Petitioner's Questions II and VI).

3. There is no reason for the Court of Appeals to be required to decide issues beyond those necessary to

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* The Supreme Court should not undertake to review concurrent findings in the absence of a very obvious and exceptional showing of error. *Graver Tank & Mfg. Co.* v. *Linde Air Prod. Co.*, 336 U. S. 271, 275 (1949).

dispose of plaintiff-petitioner's claim (Petitioner's Question III).

4. Petitioner's Questions IV and V are fanciful questions based upon a distortion of both the record and the opinions of the trial court.

5. Petitioner's "Reasons for Granting the Writ" (P. 15 to 18) are insufficient.

1. Petitioner's dissatisfaction with fact determinations. (Petitioner's Question I, P. 3, 11-12.)

The matter raised in petitioner's Question I deals entirely with the District Court's understanding (or alleged misunderstanding) of the testimony of an expert witness. This matter is hardly a proper matter for an appellate court, much less is it a "Question" which should be considered by the Supreme Court of the United States.

It should further be pointed out in justice to the expert that the meaning attributed to his statement by petitioner is a distorted one, as is shown by petitioner's own excerpt from the printed record. The proper meaning was of course clearer still when evaluated as live testimony by the trial court who heard the inflections of the spoken words.

Briefly, in the petition the expert's answer, "Well, you may interpret it that way", has been misrepresented by petitioner to mean—One skilled in the art might interpret it that way—.

It is clear even from the limited context printed in the petition Appendix E (P. 19a) and it was even clearer from the inflection heard by the trial court, that the gist of the answer was—Well, you, Mr. Rines (counsel for plaintiff), may stretch it by choosing to interpret it that way, but it is wrong to do so—.

Further discussion of this point is hardly merited, since nothing could be less appropriate for reconsideration by the Supreme Court of the United States than findings of

fact as to meaning of testimony given in open court before the trial judge, particularly where voice inflections may be significant. *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949).

2. Petitioner's opportunity for oral and written argument. (Petitioner's Questions II and VI, P. 3-4, 13 and 5-7, 14-15.)

Petitioner couches its "Questions" in such terms that it is difficult to understand what is complained of. However, it appears that the principal complaint here is limitation on oral and written argument.

As already shown above at page 4, petitioner's opportunity for argument in this case was greater than usual, since petitioner requested and received permission to exceed the limitation on both length of brief and length of oral argument provided by the rules of the Court of Appeals and had no limitation on length of brief before the trial court. Neither party upon oral argument before the Court of Appeals suggested that the time allowed was too short to adequately present its argument. It was only after two decisions adverse to petitioner that the presently urged necessity for further argument was asserted.

While petitioner unjustifiably complains here of insufficient opportunity for oral argument, there is no assertion that any argument *by brief* was curtailed by either the trial or appellate court. Nothing is more clearly within the discretion of a court than the regulation of oral argument before it. *Hodge et al.* v. *United States*, 271 F. 2d 52 (C. A. 5, 1959); *Biggs* v. *Mays*, 125 F. 2d 693 (C. A. 8, 1942).

It perhaps should be noted at this point that Question II represents that the Court of Appeals made a holding of non-infringement "for no reason at all". This comes close to being absurd on its face. The Court of Appeals opinion shows that the '098 patent was held non-infringed for

reasons substantially the same as some of the reasons given by the District Court. The '131 patent was held non-infringed because it was a so-called "sub-combination patent" held to be for the same invention as the '098 patent, and being for the same invention obviously could not be infringed when the common invention of the two patents was not used in defendant-respondent's devices.

Petitioner's Question VI charges that the Court of Appeals completely ignored the appeal with respect to the denial of the plaintiff's motions under Rules 52(b) and 59(a). This is incorrect. The Court of Appeals considered the proceedings below with respect to such motions and found they were directed solely to the question of validity (P. 12a). It therefore found it unnecessary to affirm the propriety of the denial of the motions, since the Court of Appeals chose not to destroy the patents by ruling upon their validity, and based its decision solely on non-infringement.

Petitioner's Questions II and VI relating to incomplete consideration of the issues by the appellate court are both illusory, being predicated on bare assumptions and non-existent facts, and presumptuous, in accusing both Courts below of not reviewing cross-examination testimony. Obviously, petitioner cannot have any direct knowledge as to whether the Courts below did or did not examine the record as a whole, or what other steps were taken by them in reaching their concurring decisions. Most charitably viewed, petitioner means only to express disagreement with the result reached—but he has no basis to challenge the process used by the Courts below in reaching that result. In any event, this subject is not properly the subject of review by this Court, and these questions should summarily be disposed of.

3. The Appellate Court's limitation of its holding to one issue. (Petitioner's Question III, P. 4, 13.)

The Court of Appeals in this case, though required only to determine that there was substantial evidence to support the findings of the trial court, Rule 52(a), F.R.C.P., made an independent analysis of the merits of the controversy and satisfied itself that, based on its own knowledge of this and related technology, acquired in this and other cases, defendant's accused devices did not embody the claimed invention as they did not employ his "stationary magnetic field" (P. 9a). The Court of Appeals found no fault with the other grounds upon which the trial court dismissed plaintiff's claim, but it rightfully declined to devote excessive time to determination of mooted issues. As stated by this Court in *Altvater* v. *Freeman*, 319 U. S. 359, 363 (1943):

> "To hold a patent valid if it is not infringed is to decide a hypothetical case."

Plaintiff's Question III indicates an unusual desire to have the Court of Appeals decide the additional issue of invalidity, which could not result in a change in the over-all result (i.e., dismissal of the complaint) but could result in an affirmation of the invalidity of petitioner's patents.

Perhaps if it were a relatively simple matter to review the question of invalidity, it would have been in the public interest for that question to be reviewed by the Court of Appeals, as suggested by *Sinclair & Carroll Co.* v. *Interchemical Corp.*, 325 U. S. 327, 330 (1945). However, the Court of Appeals, in the exercise of its discretion, has balanced the effort which would be required for such review (and time thus taken away from determination of other causes piled up in its backlog) against the problematical benefit to the public of a more exhaustive determination of the invalidity of the patents in this action. The Court rightly decided that the better course of action would be

to review only so much of the matter at hand as would dispose of petitioner's claim.

It is submitted that such decision of the Court of Appeals is proper, *Hap Corporation* v. *Heyman Manufacturing Company*, 311 F. 2d 839 (C. A. 1, 1963); *Del Francia* v. *Stanthony Corporation*, 278 F. 2d 745 (C. A. 9, 1960), but in any event, petitioner has no standing to try to substitute its discretion for that of the Court of Appeals by a petition for writ of certiorari.

4. Petitioner's Questions IV and V are fanciful (P. 4-5, 13-14).

Petitioner's Question IV is premised upon quotations distorted by being out of context and upon unsupported speculations with respect to the opinion of the District Court. The Court of Appeals could not possibly have the same view of the opinion and Findings of Fact of the trial court as the distorted view presented by petitioner's Question IV. The question is hypothetical and has no application to the present case.

The quotation at P. 4 from the District Court memorandum, "less likely to reflect original thought or expression," is taken out of context. (It is found in context at P. 18a.) The trial court said, in effect, at P. 18a that in a field of advanced technology, a lay judgment represents a "deliberate, informed and conscientious choice between preferred courses of action" more than "original thought or expression". The court did *not* say, as petitioner suggests, that the findings here were without original thought.

The substance of the trial judge's memoranda simply is that in such cases the court is impelled to adopt the technical wording of one of the parties, and to that extent the findings and opinion will necessarily contain less original thought or expression of the trial judge, but they will nevertheless represent a *deliberate, informed, and conscien-*

tious decision as to the relevant issues of the case. It can hardly be questioned that the most important function of the trial judge is to decide issues and not to draft technical phrases.

Petitioner asserts that the Findings of Fact, which the trial judge expressly stated "reflected my independent and meticulous check of the record itself," were in fact not checked against the entire record and specifically not checked against the cross-examination of defendant's expert witness. How petitioner could know the private acts of the court during formulation of the decision is difficult to surmise; certainly there is nothing of record on it. Presumably, petitioner bases his assertion here on the argument that the cross-examination testimony was so devastatingly contrary to the direct testimony that it must have been ignored by the trial judge. Nothing could be further from the truth, as is apparent from the laudatory comments which the trial judge made on the credibility and consistency of the testimony of defendant's expert witness. As shown elsewhere herein, the supposed contradictory cross-examination becomes fully consistent when the inflections heard by the trial judge are considered. Petitioner's Question IV must be dismissed as wholly without merit.

One might assume from petitioner's Question V (and also Question I, P. 3) that the trial judge had turned over the conduct of the case to defendant's expert witness and allowed him to decide the issues in the case. This would certainly be an unusual procedure which might merit the attention of higher authority if it were a fact. It certainly did not occur here.

Upon further consideration of petitioner's argument, it becomes apparent that this Question V is solely a fictitious creation of petitioner, stemming from the highly complimentary comments of the trial court with respect to the testimony of defendant's expert witness. The trial court in effect said (at P. 13a) that, although it was to be

expected that an expert witness would have some natural bias in favor of the party by whom he was employed, the Court found defendant's witness to be so successful at suppressing any tendency to bias, that the Court believed his statements to the Court were substantially as they would have been had he been an impartial Master appointed by the Court. Such praise for the opposition's expert witness is doubtlessly annoying to petitioner but it is hardly a basis for the Question V, which petitioner represents to this Court is present in the case.

The transparency of the distortions in the statements of Questions IV and V is such that they should be summarily dismissed from consideration as grounds for the grant of a writ of certiorari.

5. Petitioner's "reasons for granting the writ" are insufficient (P. 15-18).

The "Reasons for Granting the Writ" urged by petitioner at pages 15-18 of the Petition are frivolous and non-existent.

A. *The judicial system has NOT broken down* (P. 15).

Petitioner extravagantly leaps to the fallacious conclusion in his Reason A that the judicial system has broken down because the trial court in its discretion preferred to render its decision based upon written rather than oral arguments.

This is so openly without merit as to require no further discussion.

B. *Encouragement to inventors is NOT in issue* (P. 16-7).

Petitioner appears to argue in his Reason B that failure of the trial court to hold oral argument below will discourage future "lone" inventors and will deprive the nation of inventions of military value.

The *non sequitur* here is obvious.

C. No issue arises as to Rule 52(a) or 77(b) **(P. 17).**

Both Questions IV and V referred to here are premised upon speculative and presumptuous assumptions, that both courts below assertedly failed to consider the full testimony of defendant's expert witness, and that the trial assertedly was not conducted in open court, because the trial court considered the credibility of defendant's expert witness to be so high as to overcome a "natural bias" and to be as non-partisan as a master would be.

These assumptions are transparently without foundation in fact, and no question of scope of Rule 52(a) or Rule 77(b) exists.

D. There is no conflict with other decisions **(P. 17).**

While petitioner "invites" attention to ten prior decisions, none are here discussed. Elsewhere (P. 13-14) two are *asserted* as in conflict with the present case, as to Question IV, but no conflict is actually shown, and none exists.

As already shown, Question IV is based upon the false and unfounded premises that the courts below only partially reviewed the record, and rubberstamped defendant's expert. Since the contrary is true, no conflict can exist. It is noteworthy that in the *Louis Dreyfus* case (P. 14) the court upheld findings drafted by one party, as this Court has ruled should be done unless they are clearly erroneous. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 184-5 (1944).

E. There is no issue of due process **(P. 17).**

Denial of oral argument by the trial court is not denial of due process, since petitioner had unlimited opportunity for written argument and as shown above availed himself generously of that opportunity.

A fortiori, there was no denial of due process in the Court of Appeals, where leave was granted to have

briefs twice the normal size, and the oral argument took over three hours.

F. *No further issue exists* (P. 17-18).

There was no departure from the accepted and usual course of judicial proceedings, and when petitioner's fulminations are analyzed to reveal their substance, no departure is even argumentatively established.

Conclusion

The present petition is best characterized as a scattergun attempt to present supposed "Questions" and "Reasons For Granting the Writ" in such number and confusion that perhaps one will mistakenly be thought to merit review, whereas the case is actually an ordinary holding of non-infrigement of patents of doubtful validity.

It is clear that no issue worthy of consideration by this Court exists.

> "The jurisdiction [to bring up cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* v. *DeSpoturno Coty*, 262 U. S. 159, 163 (1923).

The petition should be denied.

Respectfully submitted,

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Office-Supreme Court, U.S.
FILED
AUG 31 1965
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 260

DORIS NYYSSONEN, Administratrix of the Estate of Einard Nyyssonen, Deceased,

Petitioner,

vs.

BENDIX CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Introduction

After eighteen years* of an up-hill fight, the widow of a lone inventor, who made several important inventions having considerable military value (P. 6, lines 7-6 from the bottom), has now appeared here to ask that she be accorded the day in court that she and her deceased inventor husband have been denied in both the District Court and the Court of Appeals.

*On p. 3 of its brief, the respondent admits that its own infringement activities alone account for at least six of those eighteen years.

Though the Patent Office had no difficulty understanding the inventions (P. 7, line 7), the District Court and the Court of Appeals say that they do not have sufficient technical training to enable them also to obtain such understanding. They have accordingly abdicated in favor of the opposing party's admittedly biased* expert witness, assumed belatedly to have been "named" master (P. 10, line 9).

Judge Irving R. Kaufman, "Masters In The Federal Courts: Rule 53", 58 Col. L. Rev. 452, 453, warned against this very abdication:

> "The chief factor militating against unrestricted references in the federal courts is the possibility that it may result in an abdication of the judicial function, exclusively reserved by the Constitution to the federal judiciary."

Very few, if any, judges have technical training, but, as explained in the last paragraph on page 15 of the Petition, with the exception of the judges in the First Circuit, they all seem to be able to find it possible to obtain an understanding of the patent cases before them, merely by listening to oral argument, and sufficient oral argument.

This Court knows (P. 16, first paragraph) the value of oral argument.

The District Court and the Court of Appeals have justified their abdication upon the gratuitous, but mistaken, assumption (P. 13, last complete paragraph) that the decision of the case depends upon "the relative credibility of opposing expert witnesses". In actual fact, however, their abdication has been based rather upon the

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*A "natural bias" arising out of "his long term association with defendant" (R. 953), under an "annual contract * * * since approximately 1950" (R. 605).

"relative credibility" of the *same* respondent's biased expert witness, on direct and cross-examination (P., top of p. 12). Both courts based their decisions on this biased expert witness' testimony on direct examination only, completely ignoring his entirely contrary testimony on cross-examination.

Question I

Relating to the Complete-Combination Claims 1 and 10 of the 098 Patent

The respondent does not controvert the petitioner's statement (P. 12, second complete paragraph) that the sole point of dispute between the parties with respect to the issue raised by Question I relates to the correct interpretation of the meaning of the two simple non-technical English words "may be", appearing in a particular passage of the patent specification, quoted on page 11 of the Petition.

On *direct examination,* the respondent's expert witness testified that those two words "may be" could have only the one meaning of "shall be" or "must be" (P., bottom of p. 11); under which interpretation, the District Court and the Court of Appeals held that the conclusion of non-infringement follows.

On *cross-examination,* however (P. 12, first complete paragraph), that same expert witness was compelled to admit that those two words "may be" are not really restricted to the interpretation "shall be" or "must be", but that they could also be interpreted to mean just exactly what they say, namely, "*may* be"; under which interpretation, the conclusion of infringement would follow.

Quite true, as the respondent argues (page 7, lines 5-3 from the bottom of its brief),* the respondent's expert wit-

*This argument of the respondent is considered more fully in Appendix F, *infra*, p. 21a.

ness, being admittedly biased, volunteered the statement (his exact testimony appears at P. 19a) that he personally does "not subscribe to" the latter interpretation. He prefers an interpretation from which the conclusion of non-infringement would follow.

This testimony of the respondent's biased expert witness, as to what he personally does "not subscribe to", did not, however, relate to facts (P. 12, next-to-the-last paragraph). It was precisely the kind of testimony that Judge Learned Hand described as "burdensome inpertinence", and that many other judges have described as objectionable "conclusory testimony" (P. 12).

Since it requires neither technical training nor expert testimony to interpret the meaning of those two simple non-technical English words "may be", it was the duty of both the District Court and the Court of Appeals themselves to interpret that meaning, and not to delegate (P. 14, last complete paragraph) that duty to that opposing admittedly biased expert witness.

This duty both the District Court and the Court of Appeals could readily have performed if they had been willing to listen to oral argument, and sufficient oral argument.

To summarize the issue raised by Question I:

Neither the District Court nor the Court of Appeals has decided this case. It has been decided by the admittedly biased expert witness for the respondent, upon the basis of his "burdensome-impertinence", "conclusory testimony" that the two simple non-technical English words "may be" should be construed to mean "shall be" or "must be", and that he does "not subscribe to" assigning to these two words the meaning that they actually do express, namely, "may be".

Addendum Relating to Question I

On page 8 of the respondent's brief, purporting to deal with Questions II and VI, the misstatement is made that, though the petitioner was, indeed, limited by way of oral argument, there was no such limitation by way of argument in writing.

This matter has no bearing whatever upon Questions II and VI, but it may perhaps have some bearing upon Question I. It is demonstrated by Appendix G, p. 22a, *infra,* that the petitioner was very severely limited, by way of argument in writing, both in the District Court and the Court of Appeals.

Questions II and III

Questions II and III relate to issues as to both of which, by the appeal, the petitioner sought, but did not obtain from the Court of Appeals, either an affirmance or a disaffirmance of the decision of the District Court (P. 9, lines 11-16 and 19).

The respondent's brief does not say that the petitioner did receive either such affirmance or disaffirmance.

Question II

Relating to the Sub-Combination Claim 1 of the 131 Patent

At the very top of page 2 of its brief, the respondent makes the misstatement that the petitioner is asking "this Court to review the concurrent holdings of the courts below".

There was no concurrent holding, however, with respect to claim 1 of the 131 patent. The Court of Appeals decided the issue of infringement of claim 1 of the 131

patent upon no ground at all (P. 9, lines 11-16), and certainly not upon the ground of decision of the District Court.

Contrary to its present argument, at the bottom of p. 8 and the top of p. 9 of its brief, the respondent so admitted in the Court of Appeals (P. 9, lines 4-5; R. 1172, second paragraph):

> "Defendant-appellee *agrees with plaintiff* that this Court's discussion of non-infringement * * * *does not apply* so directly to the language of claim 1 of the 131 patent, which omits the term 'stationary'" (italics supplied).

Question III

Relating to the Cloud Unnecessarily Cast by the Volunteered Statement of the Court of Appeals That "We Think It Clear That" the Sub-Combination Claim 1 of the 131 Patent Is Invalid, for Double Patenting

In the case of Question III, just as in the case of Question II, the respondent goes off on a tangent, without reaching the issue raised.

As in the case of Question II, again, however, the respondent changes its argument in this Court. In the Court of Appeals, the respondent several times urged that the issue of double patenting ought to be decided (R. 1174, last two lines; 1178, line 3).

The respondent appears not to dispute that neither lack of technical training nor expert testimony could stand in the way of deciding the purely legal question of double patenting (P. 13).

The Court of Appeals, without due process, has taken away the petitioner's property right in the presumption of

validity that was conferred upon claim 1 of the 131 patent by 35 U.S.C., Section 282:

"A patent shall be presumed valid".

Question IV

Relating to the Scope of Rule 52(a) of the Federal Rules of Civil Procedure

The respondent's arguments on pp. 11-12 of its brief are answered in Appendix H, p. 23a, *infra.*

Question IV, however, relates to something entirely different, namely, the scope of review, by the Court of Appeals, under the provisions of Rule 52(a).

It has been proved (P., at the middle of page 10), without denial by the respondent, and it is again proved by the Petitioner's Exhibit III, the "Affidavit of David Rines" accompanying the "Petitioner's Motion For Leave To Supplement The Record", that the District Court did not examine the record as a whole, including the cross-examination of the respondent's expert witness, but merely adopted the respondent's proposed Findings of Fact based on that expert witness' testimony on direct examination only.

Question IV inquires whether the Court of Appeals was correct in approving this action of the District Court, without itself examining the record as a whole.

As explained at the top of p. 14 of the Petition, the Court of Appeals, by thus rejecting the petitioner's contention that this is not the kind of case in which the "clearly erroneous" principle of Rule 52(a) applies (P. 5a, line 3; 11a, lines 5 and 15), has placed itself in conflict with this Court's ruling in *United States* v. *El Paso Natural Gas Company,* 1964, 376 U.S. 651, 656-657 and note 4, and also with the Court of Appeals for the Fifth Circuit, *Louis Dreyfus*

et Cie. v. *Panama Canal Company,* 1962, 5 Cir., 298 F.2d 733, 738. Since the filing of the petition, three further decisions in conflict with the Court of Appeals for the First Circuit have been published:

Featherstone v. *Barash,* 1965, 10 Cir., 345 F.2d 246, 249.

Roberts v. *Ross, Jr.,* 1965, 3 Cir., 344 F.2d 747, 751-752.

M. B. Skinner Company v. *Continental Industries, Inc.,* 1965, 10 Cir., 346 F.2d 170, 173.

These are all in accord with the practice in the Second Circuit:

Rooted Hair, Inc. v. *Ideal Toy Corp.,* 1964, 329 F.2d 761, 769 (concurring opinion).

Question V

Relating to Rule 77(b) of the Federal Rules of Civil Procedure

Question V, which is treated on p. 14 of the Petition, presents an issue as to the proper interpretation of another of the Federal Rules of Civil Procedure, Rule 77(b). The District Court belatedly "named" (P. 10, line 9) the respondent's expert witness as "master", without even safeguarding the rights that the petitioner would have had before a properly appointed master (R. 1017).

Pages 12-13 of the respondent's brief do not deal with this Question V at all.

Question VI

Relating to Due Process

Though the petitioner's complaint that she has been denied due process is not limited to Question VI, this Question VI inquires specifically whether she has been given, by the Court of Appeals, the kind of hearing to which

she was entitled on her appeal relating to the denial, "on their merits", of her motions under Rules 52(b) and 59(a), without the District Court hearing argument, either orally, by brief, or in any other way (P. 10, last 2 lines; 11, line 1).

The argument in the first complete paragraph on page 9 of the respondent's brief is refuted by the top of page 15 of the Petition. That argument is not supported by the judgment (R. 1128, last 3 lines, 1129).

Reasons for Granting the Writ

Pages 13-15 of the respondent's brief provide no answer to the Reasons A to F for granting the writ, given on pages 15-18 of the Petition.

On page 13, for example, the respondent dismisses Reason B for granting the writ (P. 16-17) as a *non sequitur.*

In "Inventors Past and Present", 39 Reviews of Economics and Statistics, No. 5, August, 1957, p. 321, Jacob Schmookler, though refuting the belief that "the independent inventor is dead and buried", neverthless warned that there is danger that

> "potential independent inventors will be dissuaded from inventing and thereby help make true what had only been believed to be true all along".

This very inventor became dissuaded from making any more inventions, and even those additional inventions that he did make died with him (R. 1160).

Conclusion

It would appear to be the duty of this Court either to restore to the petitioner the kind of trial to which she is entitled, or, if the Court should decide finally that that can not be done, to inform Congress that the federal judicial

system has broken down, and that new legislation is necessary in order to assure to litigants their Constitutional right to a fair trial in the federal courts.

It is respectfully submitted, therefore, that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX F

The Respondent's Argument As to How to Interpret Its Expert Witness' Testimony on Cross-Examination.

(Page 3, footnote, *supra*)

On page 7 of its brief, the respondent argues that the cross-examination testimony of its expert witness (quoted at P. 19a) should be interpreted to mean:

> "Well, you, Mr. Rines (counsel for plaintiff), may stretch it by choosing to interpret it that way, but it is wrong to do so".

The petitioner does not agree with that interpretation. The cross-examination consisted of three questions and three answers. The first answer was:

> "Well, you may interpret it that way";

the second answer was:

> "It is true in that interpretation, but I do not subscribe to the interpretation";

and the third answer, in response to the question:

> "But it is true with respect to that interpretation?"

was the outright, unqualified answer:

> "That's right."

There is no testimony here relating to either a "stretched" interpretation, or that "it is wrong to do so". The testimony is merely that there are two permissible interpretations, but that the witness personally chose to "not subscribe to" one of them.

In any event, however, who conferred upon this opposing admittedly biased expert fact witness the judicial function of deciding the meaning of the two simple non-technical English words "may be"? Judge Learned Hand, as before stated, p. 4, *supra*, pronounced such testimony as constituting only "burdensome impertinence".

APPENDIX G

The Limitation of Written Argument in Both the District Court and the Court of Appeals

(Page 5, *supra*)

The District Court limited the briefs to only forty pages (R. 680); and, as stated at the bottom of page 10 of the Petition, the District Court did not provide for an opportunity even to criticize the proposed Findings of Fact, whether orally or in writing.

In the Court of Appeals, the petitioner requested leave to file a brief containing 300 pages (Petitioner's Exhibit I, accompanying the "Petitioner's Motion For Leave To Supplement The Record"). The petitioner explained to the Court of Appeals, in great detail, why 300 pages were needed, "based upon * * * the plaintiff's brief as so far drafted", and expressed the "fear" that a smaller brief "would detract from the Court's understanding of the case" (concluding paragraph). The Court of Appeals, however, without giving any reason therefor, refused to permit the filing of a brief containing in excess of only 150 pages.

The Court of Appeals later realized fully the soundness of the petitioner's "fear" that 150 pages would not be sufficient for it to obtain a proper "understanding of the case", and it realized that it could obtain a better understanding through the medium of additional oral argument or additional briefs (R. 1128, P. 12a). It refused, however, to receive either (P. 11, the first complete paragraph), though the petitioner offered to supply both (R. 1139-1140, 1167, 1168).

On page 4 of its brief, the respondent says that the plaintiff filed a reply brief, in the Court of Appeals, of 25 printed pages. It neglected to explain, however, that this was the limit of the number of pages that the court rules

permitted (see the concluding paragraph of the Petitioner's Exhibit III, the "Affidavit of David Rines", annexed to the said "Petitioner's Motion For Leave To Supplement The Record").

APPENDIX H

"Original Thought or Expression"

(Page 7, *supra*)

In lines 3-2 from the bottom of page 11, the respondent attempts to justify the District Court's giving the petitioner "less" than its "original thought or expression" (the exact language of the District Court appears on p. 10 of the Petition).

The District Court itself seems not to have shared the respondent's attempted justification, else it would not have admitted that (R. 1027):

> "It is no service to the integrity of the process of justice or the development of the law for a judge to pretend otherwise".

At the bottom of page 4, the respondent says also that the District Court did not adopt the defendant's findings "entirely or verbatim". The District Court itself admitted, however (R. 953), that

> "My own findings of fact are in most respects verbatim copies of this draft"

prepared by the respondent.

There are two matters here to consider: first, "original thought"; and, secondly, "original expression".

All the "original thought" that the District Court gave to the case, as the respondent's brief, p. 5, line 3, admits, was merely its "*meticulous check* of the record itself" (italics

supplied); referring to that part only of the record that was contained in the respondent's citations to its Proposed Findings of Fact. Those citations, however, related to the *direct examination only* of the respondent's expert witness; they did not include that same expert witness' *cross-examination.*

The respondent's brief does not dispute the petitioner's statement to that effect (P. 13, last 3 lines), but this is proved also by the said Petitioner's Exhibit III, "Affidavit of David Rines".

The Court of Appeals likewise gave "less" than its "original thought". As appears from its own quotation (R. 1126, P. 10a) and the said Petitioner's Exhibit III, "Affidavit of David Rines," it, too, relied upon the respondent's expert witness' testimony on *direct examination* only. It did not quote or rely upon the same expert witness' testimony *on cross-examination* (P. 12).

The record gives a very clear answer, therefore, to the respondent's query, page 12 of its brief, as to "How petitioner could know the private acts of the court during formulation of the decision".

So much for the matter of "original thought".

The petitioner was entitled also, however, to the "original expression" of both the District Court and the Court of Appeals.

In *United States* v. *Forness*, 1942, 2 Cir., 125 F.2d 928, 942-943, certiorari denied, 316 U.S. 694, Judge Jerome Frank, speaking for the Court of Appeals for the Second Circuit, remarked:

> "The trial court is the most important agency of the judicial branch of the government, precisely because on it rests the responsibility of ascertaining the facts.

> * * * And it is not a light responsibility * * *. To ascertain the facts is not a mechanical act. * * * It involves skill and judgment * * * every effort should be made to render it as adequate as it humanly can be".

Almost the identical words were recently used in *Featherstone* v. *Barash*, 1965, 10 Cir., 345 F.2d 246, 249, *supra*, p. 8.

Judge Frank said further, at p. 942:

> "The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards".

He said also that one of the purposes of having the trial judges find the facts is

> "that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper".

Seven years later, Judge Frank amplified his views in "Courts On Trial", 1949, pages 183, 185. After repeating the last quoted passage, Judge Frank continued:

> "A trial judge, every now and then, thus discovering that his initially contemplated decision will not jell, is obliged to decide otherwise. * * * That a trial judge should make special findings of fact is therefore of importance, since his doing so is essential to his own logical assaying of his decision. * * * Frustration of the purpose of the requirement occurs where, as too often happens, the judge uncritically adopts the findings drafted by the lawyer for the winning side".

Which of the District Court's Findings of Fact displayed "original thought or expression"?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No. 260

DORIS NYYSSONEN, Administratrix of the Estate of Einard Nyyssonen, Deceased,
Petitioner,

vs.

BENDIX CORPORATION,
Respondent.

PETITION FOR A NEW HEARING OR REHEARING

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PETITION FOR A NEW HEARING OR REHEARING

On October 4, 1965, there was published, in the Federal Reporter, a new decision by the Court of Appeals for the Fourth Circuit, *Bullard Company* v. *General Electric Company,* 348 F.2d 985, 990, in decided conflict with the decision of the Court of Appeals for the First Circuit in the present case, wherefore the petitioner respectfully prays for a new hearing, or a rehearing, with respect to this Court's denial of her petition for certiorari, and particularly with respect to her Questions Presented IV, V and VI.

INTRODUCTION

The Fourth Circuit case will be discussed presently. It is desired first to emphasize, however, that the petitioner is here raising Constitutional questions. She complains that she has not received the kind of trial to which she is constitutionally entitled. She complains that her case has been decided, in the District Court, not by the District Judge, as required by the Constitution, but by a so-called master, belatedly appointed at the very end of the taking of the testimony; and that the Court of Appeals for the First Circuit, instead of deciding the case for itself, has contented itself with merely construing Rule 52(a) of the Federal Rules of Civil Procedure as authorizing this procedure in the District Court.

If this case had come up before 1925, therefore, the petitioner would have been heard in this Court. One of the principal objections to the legislation of that year was based upon the concern of Congress that, under its provisions, "Constitutional rights might go unprotected", Alpheus Thomas Mason, "William Howard Taft", Simon and Schuster, 1965, page 111.

The petitioner is not, by her petition for certiorari, asking for review of this case upon the merits. Such a review is not possible, because the petitioner has never received any decision upon the merits. The petitioner is asking only that there be restored to her her Constitutional right to a fair trial in the District Court,—a trial decided by the District Judge himself, as in all other cases in that District Court, and not by a belatedly appointed so-called master.

This Constitutional right to a fair trial, however, the District Judge has refused to grant, assigning, as his rea-

son for this refusal, that he lacks the necessary technical training upon the basis of which to understand the case.

But the judge made no effort to obtain such an understanding. How could he possibly obtain such understanding in the absence of testimony which he refused to hear at the trial (R. 387, lines 18-24, R. 1014, lines 9-22), or in the absence of oral argument, which he also refused to hear?*

The judge himself recognized the fact that, by delegating the decision of this case to the before-mentioned belatedly appointed so-called master, he was doing something that he had no right to do. He admitted (R. 1027) that he was thereby depriving the petitioner of the benefit of his "original thought or expression", and also that

> "It is no service to the integrity of the process of justice or the development of the law for a judge to pretend otherwise."

He admitted, therefore,—and he could not "pretend otherwise",—that he was thereby denying to the petitioner the kind of Constitutional trial that he gives to all other litigants, as he himself says that he does, in his recent book "Whereas", Little Brown and Company, 1965, page 4, lines 8-10.

In that book, he expressed great admiration for the late Judge Jerome Frank. The views of Judge Frank, upon this very topic, are already before this Court (Reply Brief, pages 23a-25a).

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*On the same page 111, Professor Alpheus Thomas Mason quotes Senator Thomas J. Walsh as protesting against the 1925 legislation upon the ground that a litigant should not be "compelled" to submit his case "without oral argument", thus burdening him "with the odds all against him".

All that the petitioner asks is that she be accorded her *Constitutional right to the equal protection of the law.* She maintains that she should not be deprived of the same Constitutional right to a fair trial that all other litigants receive in that same District Court, and that Judge Frank insisted that all litigants should receive in all courts.

QUESTIONS PRESENTED IV, V AND VI

Question Presented V

Returning now to the recently decided case in the Fourth Circuit, it appears that, in that case, as in the present case, owing to lack of technical training, the District Court appointed a so-called master.

Though, unlike the present case, the District Court in the Fourth Circuit case, 234 F. Supp. 995, 996, was fully "conscious of its ultimate judicial responsibility to decide the issues presented" for itself, and not to abdicate in favor of the so-called master, the Court of Appeals for the Fourth Circuit nevertheless strongly criticized such procedure.

In the present instance, on the other hand, the Court of Appeals for the First Circuit fully approved the procedure that the Court of Appeals for the Fourth Circuit thus criticized.

The petitioner therefore prays that this Court grant her petition for certiorari with respect to at least Question V, in order to resolve this conflict.

It is respectfully submitted that this Court should instruct the District Courts that, in cases where they admit lack of understanding of a case, because of insufficient technical training, they should at least receive full evidence at the trial and listen to oral argument.

In the present instance, particularly with a District Judge of "unusual intellect"* (R. 1162), who impersonates "a combination of Lord Mahsfield and Fiorello LaGuardia", *McLaughlin* v. *Venore Transportation Company*, 1965, D.C. Mass., 244 F. Supp. 802, 806, his lack of understanding would have disappeared entirely had he received the proffered evidence and testimony at the trial (R. 387, lines 18-24, 1014, lines 9-22) and had he received oral argument (Reply Brief, page 4, the second complete paragraph).

Question Presented VI

The petitioner exercised her legal right to file motions under Rules 52(b) and 59(a), the latter of which raised up the Court's refusal to receive evidence at the trial (R. 1014, lines 9-22). She was constitutionally entitled to a hearing thereon, both oral and written, particularly in a situation where the District Judge admitted that he did not understand the case. She was not heard, however, *either* orally or in writing.

Question Presented IV

The Court of Appeals for the Fourth Circuit held (page 986) that, under the circumstances of the case before it, the "clearly erroneous" provision of Rule 52(a) of the Federal Rules of Civil Procedure was not applicable, and it thereupon decided the case for itself.

In the present case, on the other hand, under almost identical circumstances, the Court of Appeals for the First Circuit held that that "clearly erroneous" provision of Rule 52(a) *was* applicable, and it refused to decide the case for itself.

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*The petitioner does not charge the District Judge with lack of judicial capacity, as did this very same District Judge recently with respect to a judicial appointee. But judicial laziness may as inexorably lead to a failure of justice as lack of judicial capacity.

REASONS FOR GRANTING THE WRIT

Altogether aside from the fact that the petitioner has been denied her constitutional rights, the District Courts are continually confronted with situations as to which they are not technically trained, and they will become more and more so confronted as technology advances. The difficulties, moreover, are by no means restricted to patent suits. In Chapter 12 of his book, "A Judge Comes of Age", Charles Scribner's Sons, 1940, as one example only, Judge John C. Knox discussed quite a number of non-patent cases which, on page 217, he said that he "faced" "almost with dread".

It is believed to be now the duty of this Court, therefore, to attempt to solve this problem. If it should decide that it can not do so, the matter should be called to the attention of Congress; otherwise that task will have to be performed by the laity. Perhaps, if this Court can not solve this problem under the present law, Congress should be asked to reconsider its before-mentioned legislation of 1925.

Wherefore the petitioner prays that this petition for a new hearing or rehearing be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the above petition for a new hearing or rehearing is presented in good faith and not for purposes of delay, and that it is restricted to grounds specified in Rule 58 of the Rules of this Court.

.....

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